IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-911

HOWARD S. PRESSMAN, *Petitioner*

v.

MURIEL PRESSMAN NELLIS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PHILIP SHINBERG
Counsel for Petitioner
514 Washington Building
Washington, D. C. 20005

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Howard S. Pressman, petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above cause on October 20, 1971.

OPINIONS BELOW

1. Opinion of the trial court dated May 12, 1971. (Appendix A)

2. Opinion of the District of Columbia Court of Appeals dated October 20, 1971, reversing the judgment of the Superior Court of the District of Columbia (majority and dissenting opinions). (Appendix B)

3. Order of the District of Columbia Court of Appeals denying petitioner's Motion for Rehearing en Banc dated November 15, 1971. (Appendix C)

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, and Title 11, District of Columbia Code, Section 102. The judgment sought to be reviewed is dated and was entered on October 20, 1971. The order denying petitioners Motion for Rehearing en Banc is dated November 15, 1971.

QUESTIONS PRESENTED

1. Whether the use by minor children of the surname of their natural father, in the absence of abandonment, neglect or wrongdoing on the part of the natural father, is in the best interests of said minor children.

2. Whether the use by minor children of the surname of their stepfather, without the consent of, and in the face of opposition from, the natural father, is detrimental to the best interests of said minor children.

3. Whether the use by minor children of the surname of their step-father, without the consent of, and in the face of opposition from, the natural father constitutes an unwarranted and illegal adoption of said minor children by the stepfather.

4. Whether the District of Columbia Court of Appeals, in the absence of any abuse of discretion by the trial court, was justified in reversing an injunction by the trial court preventing the natural mother of the minor children from using any surname for said children except that of their natural father.

5. Whether the order of the trial court enjoining the respondent from using any surname for the minor children other than that of their natural father was based upon competent evidence and supported by the record, and therefore not subject to reversal by the District of Columbia Court of Appeals.

6. Whether the trial judge misconceived the real issue in the case at bar, or whether such real issue was misconceived by the District of Columbia Court of Appeals.

7. Whether the judgment of the District of Columbia Court of Appeals is contrary to law and should be reversed by this Court.

STATEMENT OF THE CASE

Petitioner and respondent were married on March 25, 1951, and divorced on October 18, 1964. Two children, Adam and Amy, were born of said marriage. Shortly after the divorce, respondent married her present husband, Joseph Nellis, and since that time the respondent and the two minor children have resided with Mr. Nellis in the District of Columbia. The natural father of the children, petitioner herein, resides in Chester, Pennsylvania.

In 1965 or 1966 the respondent, without notice to the petitioner and without his consent, began to use the name "Nellis" for both children in school and in other

ways. Petitioner discovered in October, 1967 that the use of his surname for the children had been discontinued, at which time petitioner complained to respondent and demanded that respondent cease using the surname "Nellis" for said children and resume the use of the surname "Pressman". Respondent refused to do so and in June, 1968, petitioner filed suit against the respondent in the Superior Court of the District of Columbia, then the District of Columbia Court of General Sessions, for custody of the children. Petitioner's Complaint in that case made specific requests for relief and also a general prayer for relief. Because of the delays in the court calendar and through no fault on the part of the petitioner, the case did not come to trial until June, 1970, at which time the Complaint was orally amended to withdraw the demand for custody and to replace the same with a specific prayer to enjoin the use of the step-father's surname by or for the children, which was consented to by the parties through their counsel and ordered by the trial judge. After a full hearing, the trial court entered a judgment which fixed the petitioner's visitation rights which had been in dispute and enjoined the respondent from using or allowing to be used in any manner or circumstance any names for said minor children other than "Adam Jay Pressman" for the male child and "Amy Ellen Pressman" for the female child. Respondent filed a Motion for a Partial New Trial restricted solely to the trial court's injunction, which was granted, and retrial on that issue took place in April, 1971. At the retrial, petitioner, respondent, three expert witnesses and both children testified, after which the trial court again entered an order enjoining the respondent from causing the children to be known by any surname other than

their natural father's. This order was subsequently reversed in a two-to-one decision by the District of Columbia Court of Appeals on October 20, 1971, and en banc rehearing denied on November 15, 1971.

REASONS FOR GRANTING THE WRIT

1. The question in this case is of paramount importance nationally and not confined to the District of Columbia. Considering the tremendous number of marriages, divorces and remarriages in the United States every year, the problems inherent in the use of the surname of children of divorced parents are mountainous when disputes arise between the parents. In the case at bar, the issue is whether or not the best interests of minor children are served by requiring that they use the surname of their natural father when he is alive and free of fault as opposed to the use by the children of the surname of the step-father. However, the implications of the decision of the District of Columbia Court of Appeals go far beyond that question and answer. If an appellate court in the District of Columbia has the right to reverse a local court's order requiring that children be known by the name of their natural father, what further inroads may be perpetrated upon the best interests of minor children too young and too weak to resist the manipulations of a vindicative mother, and what further inroads can thus be perpetrated upon the rights of an innocent, loving natural father by such mother? The implications of the answer are enormous and frightening when the large number of persons, now or in the future, who can be affected are considered. Therefore, it is fair to state that the issue of the use of the surname by or for minor children is not a local issue confined to the District of

Columbia but is of national importance and of great magnitude and should be determined by this Honorable Court.

2. The decision of the District of Columbia Court of Appeals in this case has created a conflict between the highest courts of states of the United States and should be resolved by this Court. This question is closely akin to the matters set forth in paragraph 1 hereof. The trial judge in this case relied heavily upon the decisions in *Ouellette* v. *Ouellette*, 245 Ore. 138, 420 P.2d 631 (1966) and *Mark* v. *Kahn*, 333 Mass. 517, 131 N.E. 2d 758, 53 ALR 2d 908 (1956). The *Ouellette* case is the expression of the highest court of the state of Oregon; *Mark* v. *Kahn*, of the state of Massachusetts. Both emphatically and unqualifiedly hold that the best interests of minor children are served by requiring the use of the natural father's surname. The District of Columbia Court of Appeals, in reversing the trial court, paid little or no attention to the opinions of the highest courts of Oregon and Massachusetts. Since the opinion of the District of Columbia Court of Appeals on October 20, 1971, the Court of Appeals of Maryland, on November 9, 1971, in the case of *West* v. *Wright*, 283 A.2d 401, has taken a position consistent with *Ouellette* v. *Ouellette* and *Mark* v. *Kahn* and in absolute conflict with the decision of the District of Columbia Court of Appeals in the case at bar. The similarities between the case at bar and *West* v. *Wright* in relevant areas are striking. Both were cases of first impression; both involve the changing of the surnames of the children to that of the step-father; in both cases the natural father was far removed from the abode of the children distant-wise; in both cases the natural father was not guilty of any shameful or disgraceful conduct and had

not willfully abandoned the natural ties between the father and the children; in both cases the natural father had maintained a fatherly interest in the children and had maintained support payments for the children; in both cases there were minor irritations and embarrassments to the children because of the difference between their surname (that of the natural father) and the surname of the mother who had remarried. The facts and circumstances of *West* v. *Wright* and the opinion of the court are so important that the entire opinion has been attached hereto as Appendix D. We now have a situation where three appellate courts have ruled that it is in the best interests of minor children to carry the surname of their natural father in the absence of misconduct or wrong doing on the father's part (Oregon, Massachusetts and Maryland) and one appellate court (District of Columbia) holding to the contrary. The question of the surname for minor children contains broad and serious potentials. Most of the states of the United States have had no pronouncements by their highest courts on the question involved in this petition. Millions of people are now, and in the future will be, affected by what position is ultimately taken by those states which have not yet reached decisions on the point involved in this petition. See footnote 2, *West* v. *Wright*. It is of national as well as local importance that this court determine the answer in such fashion as to constitute a directive to all courts in all jurisdictions and thereby prevent confusion and impairment of basic rights. It is obvious that the District of Columbia Court of Appeals will listen to no court other than the Supreme Court of the United States. It ignored *Ouellette* v. *Ouellette* and *Mark* v. *Kahn* and probably would have ignored *West* v. *Wright*

had that case been decided prior to the case at bar. In addition to the question of national importance created by the conflict between the various jurisdictions, we have the highly dangerous and explosive problem created by the conflict between Maryland and the District of Columbia because they are contiguous. The administration of justice in cases of this type should not depend upon the chance of where the parents live after re-marriage. This situation can and should be prevented by this Honorable Court granting this petition and making a final determination which all courts everywhere in the United States will be forced to obey.

3. The majority opinion of the District of Columbia Court of Appeals is patently wrong. Not only did the majority make factual errors not supported by the record, but as pointed out by the dissenting opinion of Judge Reilly, the majority in effect tossed into the ashcan the law in the District of Columbia in domestic relations matters which had existed for years. The position of the petitioner in this case is most lucidly and learnedly set forth in the dissenting opinion of Judge Reilly which takes sharp issue with the majority opinion. The very fact that the District of Columbia Court of Appeals split in a two-to-one decision in a novel case of first impression is in and of itself a sound reason for this Honorable Court to grant this petition. Taken together with the considerations set forth in paragraphs 1 and 2 of the Reasons for Granting the Writ, it would seem imperative that this Court grant this petition and settle this very important question.

4. The decision of the District of Columbia Court of Appeals, in effect, allows the adoption of minor chil-

dren by their step-father without the consent of, and in the face of opposition of, the natural father. What has happened in this case could not have happened had the step-father, Mr. Nellis, attempted by legal proceedings to adopt the children. Mr. Pressman's existence alone as the natural father would have prevented this. It should be remembered that the children live with Mr. Nellis in the District of Columbia far removed from the natural father, who lives in Chester, Pennsylvania, and are with the natural father only at holiday times by order of the court. To allow the children to use the name of the step-father and to in effect cut their connection or association with their natural father except when visiting him in Chester, Pennsylvania, makes the step-father the real father for all practical purposes. Thus the decision of the District of Columbia Court of Appeals is tantamount to an adoption of the children by the step-father without the natural father's consent. This is contrary to law, and should be so declared by this Court.

5. The decision of the District of Columbia Court of Appeals violates the fundamental rule that a decision of a trial court, based upon proper evidence, cannot be disturbed by an appellate court unless the trial court has abused its discretion. As pointed out by Judge Reilly in his dissent, the majority of the District of Columbia Court of Appeals has not found that the trial court's findings of fact lack evidentiary support or constitute an abuse of discretion. The majority of the District of Columbia Court of Appeals attempt to justify their action in reversing the trial court by stating that the trial court did not evaluate the true problem in this case. Basically, the majority are guilty of the charge which they level against the trial judge.

If an appellate court would have no power in a proper case to disturb an award of custody of minor children to one parent or another (a matter of obviously greater importance than the use of a surname), what right did the District of Columbia Court of Appeals have to disturb the trial judge's injunction against the mother with reference to the use of the surname for the children? No lack of evidence before the trial judge was shown; no abuse of the trial judge's discretion was shown. It is respectfully submitted that the trial judge completely understood the true problem in this case and entered an order which is clearly supported by the evidence and constitutes a proper exercise of discretion. That order should be restored by this Court.

6. The use of the natural father's surname for the minor children is in the best interest of the children. The petitioner, Pressman, is a man devoid of any shameful or disgraceful conduct, has no criminal record, is a reliable and responsible businessman, has shown great love and affection for his children, has consistently supported his children and is now doing so, and in every respect can be considered a good father. He has engaged in extensive and expensive litigation to accomplish what he considers to be in the best interests of his children. No contention has been made, as well there cannot be, that for the children to be known as the children of the natural father can in any way be detrimental to the children except for the alleged minor annoyances or inconveniences caused by the difference in the names of the children and the name of the mother by virtue of her remarriage. Under these circumstances, the use of the step-father's surname is detrimental to the best interests of the

children, in addition to being an invasion of the inherent rights of the natural father. The record shows that initially the problem was created by the mother, the respondent herein, by suggesting to the male child, Adam, that it would be better for him to use his step-father's name than to continue to use the name Pressman. The female child, as shown by the record, has never had any problem of any serious nature, and has none now. She would be just as happy to use the name Pressman as the name Nellis. The problems allegedly encountered by Adam are obviously the result of improper influences upon this child by the mother and possibly the step-father as set forth in the opinion of the trial judge dated May 12, 1971, in which the trial judge says,

> "The natural father here is a man of substance. He has not shirked his duty or responsibility with respect to support of his children and he has shown himself to be hungry and eager for companionship with his children during those periods when they are allowed to be in his custody. He has sought to preserve and to nurture the parental relationship with his two children. *Any erosion of that relationship which has occurred has not been through fault of the natural father, but rather by the subtle device of a series of fait accompli.*"

In light of these findings by the trial judge, which admittedly are supported by the evidence and admittedly do not constitute an abuse of discretion, the reversal of the injunction of the trial court by the District of Columbia Court of Appeals is patently wrong and should be reversed by this Honorable Court.

CONCLUSION

It is submitted that the rules of this court concerning considerations governing review on certiorari apply to this case. This case involves an important question of national concern; it involves a conflict on a question of novel first impression between states of the United States; it involves potential effects upon millions of persons, some not yet born; and it has resulted in a decision of the highest court of the District of Columbia which is patently wrong, illegal, and in conflict with the decisions of respected jurisdictions which are patently correct. These considerations call for an exercise of this Honorable Court's power of supervision. It is submitted that this petition should be granted.

Respectfully submitted,

PHILIP SHINBERG
Counsel for Petitioner.